IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1480

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent, David Wayne Greenfield, In Forma Pauperis, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 741 F.2d 329.

QUESTIONS PRESENTED

1. Whether a defendant is denied due process of law by the prosecutor's reference to and use of his post-arrest, post-Miranda silence and invocation of his right to counsel during trial and final argument, when that defendant presents an insanity defense.

2. Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594(1977), when Petition did not appeal the District Court's ruling on this issue but raised it only belatedly in a Petition for Rehearing filed with the Eleventh Circuit Court of Appeals.

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STATEMENT OF THE CASE

Respondent accepts the statement of the case contained in the Petition for Writ of Certiorari, except as supplemented herein.

In his opening statement, Respondent's trial attorney confirmed to the jury that the defense was not guilty by reason of insanity but did not admit or concede that Respondent had committed the offense and in fact reminded the jury of the state's burden of proof, explaining that the defense was, "if it can be proven that he did commit it," that the defendant was insane (TR-16, 17).

During the state's case in chief, the prosecutor asked officer Pilafant, the arresting officer, whether the defendant had said anything to him after his arrest, to which Pilafant responded, "No, sir" (TR-76). The prosecutor then elicited that Pilafant had advised Respondent of his Miranda[1] rights, after which the following colloquy occurred:

> Question: When you asked him "Did you understand these rights, what did he state?
> Answer: He stated yes, he did.
> Question: And when you asked him the question if he wanted to talk to you at this time what did he say?
> Answer: No, he did not, He wished to talk to an attorney first.
> Question: Is that the exact words he used?
> Answer: Lawyer, sir. (TR-77; 78)
>
> * * *
>
> Question: All right. Did he talk to you at any time at booking.
> Answer: o, sir. We asked him at that time if - I - I'm not sure exactly who asked him the question. But he - I know he stated to me personally that he did not wish to make any statements at the time, wanted to talk to a lawyer. (TR-7$).
>
> * * *
>
> Question: To your knowledge did he in fact speak to an attorney that day?
> Answer: Yes, sir. He spoke with an attorney name of Larry Staub. 747-7591.
> Question: After he spoke with that attorney, did he make any statement?
> Answer: No, sir. He did not. Not to my knowledge. Not to myself, at least.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1601, 16 L.Ed.2d 694 (1966).

Upon arrival at the police station, Detective Gordon R. Jolley interviewed Respondent, after ascertaining that he had been advised of his constitutional rights (TR-95). Detective Jolley testified:

> "... I asked him if he wished to give up the right to remain silent and talk to me about this case. He replied, "No, I want to talk to an attorney". At that time no further questions were asked. (TR-96)
>
> * * *
>
> "We proceeded with the booking of the defendant at this time we asked him if he desired attorney. We informed him that if he desired one or could not afford one, one would be appointed for him free of charge at that time, and asked him if he desired to speak with an attorney at that time. He replied yes. We telephoned the number for the Public Defender's Office and a man answered, identified himself as an attorney, Larry Staub, and the phone was handed to the defendant" (TR-97).

The colloquy continued:

> Question: "All right. After the conversation between the defendant and his attorney what occurred?"
> Answer: I then asked the defendant if after having spoken to his attorney if he desired again to give up the right to remain silent, and at that time, talk to me about the case. He again replied no. (TR-97; 98).

During his summation, the prosecutor on two occasions made reference to Greenfield's invocation of his constitutional rights, urging significance from Greenfield's conscious decision to exercise his rights given that this was "supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time." (TR-338). He argued:

> "... he says, "I understand my rights. I do not want to speak. I want to speak to an attorney ..." (TR-338).
>
> "... and then even down at the station, according to Detective Jolley - he's down there. He says, "have you been read your Miranda rights? "Yes, I have." "Do you want to talk"? "No." "Do you want to talk to an attorney"? "Yes." " And after he talked to the attorney again he will not speak." (TR-339).

At this point, defense counsel objected to this comment on Respondent's silence and after an off the record bench conference,

the trial court overruled the objection (TR-339). In the Federal habeas corpus proceedings, the United States Magistrate held an evidentiary hearing on the sole issue of whether there had been a waiver of objection by Respondent, under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). (See: Vol. II, record on appeal). The Magistrate, in his Report and Recommendation, determined that Respondent had preserved the issue by proper objection and that, in any event, the state appellate court had reached the merits of the claim (R-176). The Petitioner did not file written objections to this finding and did not otherwise oppose the District Court's order, which adopted the Magistrate's Report and Recommendation (R-185).

Before the Eleventh Circuit, the Petitioner Wainwright did not raise by cross-appeal or otherwise the issue of waiver under Wainwright v. Sykes. Neither party briefed the Wainwright v. Sykes issue and the Eleventh Circuit mentioned it only parenthetically in footnote no. 1 of its opinion. Only after the Eleventh Circuit had reversed the District Court did Petitioner, in his Petition for Rehearing, address himself to the Wainwright v. Sykes waiver issue.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court's Prior Decisions are Controlling:

The instant case falls clearly within the proscription against the use of post-Miranda silence announced by this Court in Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Doyle is therefore controlling and certiorari need not and should not be granted.

In Doyle, this court held that a prosecutor's use of a defendant's post-arrest, post-Miranda warning silence, to impeach the Defendant's alibi defense, violated the due process clause of the Fourteenth Amendment. This Court gave two reasons for proscribing the use of a defendant's post-arrest, post-Miranda silence. First, such silence was deemed to be "insolubly ambiguous" and therefore had low probative value. 426 U.S. at 617, 96 S.Ct. at 2244. The ambiguity was said to exist because the Miranda warnings advise a defendant that he has the right to remain silent, that anything he says may be used against him and that he has the right to consult with counsel before submitting to interrogation. Silence, as this Court observed, in the wake of these warnings, may be nothing more than the arrestee's exercise of his Miranda rights. Secondly, this Court noted that while Miranda warnings do not contain an express assurance that silence will carry no penalty, there is an implicit assurance in the warnings that one's silence and the exercise of his rights will not carry any penalty. In light of this implicit assurance, this Court determined it would be "fundamentally unfair and a deprivation of due process" to allow the arrested person's silence to be used to impeach an explanation "of the crime" subsequently offered at trial. Id. at 618, 96 S.Ct. at 2245. As the Eleventh Circuit reasoned, whether the evidence of silence is introduced on the issue of substantive guilt or innocence or on the issue of insanity, the implicit assurances in the Miranda warnings are the same, to wit: that a defendant will not be penalized for maintaining silence. Greenfield v. Wainwright, supra.

Petitioner can advance no sound reasons why this Court should depart from or overrule Doyle v. Ohio. Silence today is still "insolubly ambiguous", regardless of the defense which a defendant presents during the course of his trial. As observed by the Supreme Court of Florida:

> "In sum, just what induces post-arrest, post-Miranda silence remains as much a mystery today as it did at the time of the Hale decision. Silence in the face of accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt". State of Florida v. Burwick, 442 So.2d 944, 948 (Fla. 1983), cert. denied ____ U.S. ____, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984) in which the Florida Supreme Court specifically disapproved of the decision of the Florida Second District Court of Appeal in Greenfield v. State, 337 So.2d 1021 (Fla. 2nd D.C.A. 1976).

The opinion of the Eleventh Circuit reflects a considered evaluation of the trial testimony of the two psychiatrists who considered Greenfield to be a paranoid schizophrenic. Observing that the psychiatric testimony suggested that such a person is often quiet, the Court appropriately determined that the probative value of one's post-arrest, post-Miranda warning silence in determining his sanity "will vary markedly with the disease he has, the symptons he tends to exhibit and the closeness in time between the arrest and warning and the crime." Observing that silence, under these circumstances, might only reflect one's paranoia that the authorities were persecuting him even though he was innocent, and that the silence would be consistent with the mental disease of paranoid schizophrenia, the Court appropriately determined that such evidence was not probative of Greenfield's sanity.

Further, the Eleventh Circuit found nothing in the Miranda "assurances" given to Greenfield which limited them to the instance where guilt, rather than insanity, would be the trial issue. Observing that Greenfield exercised his rights to silence and to counsel after receiving the same implicit assurance Doyle received, the Court correctly concluded that Doyle v. Ohio prohibited the use of comment upon the exercise of those rights, noting:

> If such "conduct" is not protected, no Fifth Amendment protection would exist. There would be no alternative to self-incrimination. One would simply choose whether to incriminate himself by inference from silence, or by verbal means. 741 F.2d 329, footnote no. 6.

In this case, just as in Doyle v. Ohio, the state pleads necessity as justification for the prosecutor's use of a defendant's post-arrest, post-Miranda silence. Yet, as observed by the Florida Supreme Court in Burwick, post-arrest, post-Miranda silence remains as much as mystery today as it did at the time of the Hale decision. Necessity simply cannot justify the use of one's silence and the exercise of one's constitutional rights, given the assurances contained in the Miranda warnings. These assurances are significant to all criminal defendants, regardless of the nature of the defense raised, absent perjury or legitimate impeachment when a defendant testifies. See: e.g. Harris v. New York, 401 U.S. 222 (1971); Jenkins v. Anderson, 447 U.S. 231 (1980); Fletcher v. Weir, 455 U.S. 603 (1982). Unlike these cases, however, Greenfield did not testify during his trial, and therefore could not have committed perjury. Furthermore, Greenfield's silence occurred after he had been arrested and advised of his Miranda rights. These cases reflect that this Court has never shown a tendency to allow use of post-Miranda silence against a non-testifying defendant under any circumstances.

The Eleventh Circuit Court of Appeals correctly analyzed the case under the teachings of Doyle and correctly determined that Doyle proscribes the use of Greenfield's post-arrest, post-Miranda silence under these circumstances. In this case, the use of Greenfield's silence and his invocation of his right to counsel was clearly an attempt by the prosecutor to draw meaning, to wit: guilt, from that silence and Sixth Amendment assertion. As such, it was constitutionally impermissible and in derogation of Petitioner's Fourteenth Amendment right to due process.

The Decision Below Follows an Unbroken Line of Authority:

Not only does the Eleventh Circuit opinion below follow the controlling authority of Doyle v. Ohio, supra, but it also follows

an unbroken line of authority reflected in various opinions and decisions of this Court decided since Doyle v. Ohio.

For example, in South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916 (1983), Justice O'Connor, writing for the majority, reiterated the Doyle logic:

> "... the Miranda warnings emphasize the dangers of choosing to speak ("whatever you say can and will be used as evidence against you in court"), but give no warning of adverse consequences from choosing to remain silent. This imbalance in the delivery of Miranda warnings, we recognized in Doyle, implicitly assures the suspect that his silence will not be used against him" 103 S.Ct. at 924.

In Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), this Court approved the cross-examination of a testifying defendant whose trial explanation included facts which were not included in his explanation given to the arresting officer in the post-Miranda interrogation. This Court distinguished that case from Doyle, concluding that the instant cross-examination did not refer to the defendant's exercise of his right to remain silent but rather referred to his inconsistent explanations during trial. The Court noted that:

> Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But Doyle does not apply to cross-examination which merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all. 100 S.Ct. at 2182.

In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), this Court approved of the use of pre-Miranda silence to impeach a testifying defendant. This Court distinguished Doyle v. Ohio, observing that post-Miranda silence cannot be used against a defendant because of the implicit assurances contained in the Miranda warnings. The Court observed that Jenkins was not "lulled into a false sense of security that his silence would not be used against him", again confirming

the proscription against use of one's post-Miranda silence for impeachment purposes. 447 U.S. at 239-40.

Finally, in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490, (1982), this Court held that arrest alone is not sufficient to implicate due process considerations and that only the giving of a Miranda warning or an equivalent affirmative assurance raises a fundamental fairness issue, citing Doyle v. Ohio. 445 U.S. at 606-07. Fletcher v. Weir specifically limited Doyle's holding to silence occurring after Miranda warnings and this Court remains steadfast in proscribing the use of post-Miranda silence for impeachment purposes.

This Court, on an Earlier Petition for Certiorari Involving the Same or Similar Questions and Substantially Identical Circumstances, Declined Review:

In State of Florida v. Burwick, supra, the Florida Supreme Court directly addressed the issue of whether evidence of a defendant's post-arrest, post-Miranda silence is admissible on the issue of sanity. In specifically disapproving of the Florida Second District Court Appeal decision in Greenfield, the Florida Supreme Court reasoned:

> "Regardless of the nature of the defense raised, the evidentiary doctrine in Hale remains intact. Post-arrest, post-Miranda silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence. ... Contrary to what Greenfield intimates, these ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue. ... For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent." 442 So.2d at 948.

This Court denied the State of Florida's Petition for Certiorari in Florida v. Burwick. (Case No. 83-1316), ____ U.S. _____, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). The facts in Burwick were substantially identical to the facts in Greenfield.

Burwick presented an insanity defense and the state, in a successful rebuttal of that defense, introduced evidence that Burwick, after being advised of his Miranda rights, remained silent and requested an attorney. Not only did the Florida Supreme Court find the probative value of this evidence lacking because of the ambiguous explanations for silence, it reasoned:

> "To permit the state to benefit from the fruits of its own deceptions violates the due process clause of the Fourteenth Amendment and Article I, Section 9, of the Florida Constitution. 442 So.2d at 948

Now, a little more than one year after this Court declined to review Burwick, the State of Florida again asks this Court to visit this issue. The Petitioner cites no intervening authority and offers no justifications or explanations which would distinguish the instant case from Florida v. Burwick, and which would now justify certiorari review.

The Allegedly Conflicting Decisions are Distinguishable:

In Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied 460 U.S. 1043, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983), that Court was concerned only with the use of a defendant's post-Miranda request for an attorney. The case simply did not involve the use of a defendant's post-Miranda silence. In fact, that Court reasoned that "the deterent effect in this case is more tenuous than that stemming from admission of testimony about a defendant's refusal to give a statement to police." The Court found that the use of a defendant's request for counsel had only a "slight inhibiting effect on the constitutional right of silence", whereas jurors would be "quite likely to infer guilt from a defendant's refusal to give a statement to the police ...". 689 F.2d at 130. It should be noted that the Seventh Circuit in Sulie declined to adopt a rule of blanket admissibility, even with regard to a defendant's request for counsel.

In the instant case, not only was defendant's request for counsel utilized by the state, but on at least four occasions during his trial, his refusal to discuss the matter with police was elicited. Further, there is no indication in the Sulie case that the evidence was introduced in the state's case in chief, as in the instant case, or that the defendant's invocation of his constitutional rights was highlighted and argued to the jury by the prosecutor in his final argument, as in the instant case.

United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978) presents a closer question of conflict. However, it too is distinguishable on its peculiar facts. In that case, the Court specifically noted that "the government did not exploit post-arrest silence", citing United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99. 578 F.2d at 288. In light of this statement, it can be safely assumed that had the government exploited or highlighted Trujillo's post-Miranda silence, the Tenth Circuit would not have been so tolerant. In the Greenfield trial, however, as has been noted, the prosecutor, during final summation argued the significance of Greenfield's post-Miranda silence and request for an attorney, obviously in an attempt to infer meaning, to wit: sanity and guilt.

At page 14 in his Petition for Certiorari, Petitioner attempts to draw an analogy between his desired use of a defendant's post-Miranda silence and the use of illegally obtained evidence to impeach a defendant who perjures himself while testifying or who testifies inconsistently. However, none of the cases cited by Petitioner could possible justify the use of one's post-Miranda silence, in the face of the implicit assurances contained in the Miranda warnings. According to the Petitioner's convoluted theory, when a defendant raises insanity as a defense, the prosecution can disregard the assurances of the Miranda warnings and thereby benefit from the fruits of its own deception. As appealing as this may be in the interest of obtaining a conviction, such reasoning does wholesale violence to the holdings in Doyle v. Ohio, United States v. Hale, and Miranda v. Arizona.

Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), cited by Petitioner as being in conflict with the decision below, is also distinguishable on its facts. In that case, the prosecution offered the defendant's statement: "As regards what happened this evening, I want to talk to my attorney", made to a police officer after Miranda warnings. However, that court specifically noted that neither Doyle nor Hale was applicable because the case did not involve an attempt by the prosecutor to use the defendant's silence or failure to testify against him or for impeachment purposes. In fact, Jacks had not remained silent but had voluntarily and freely spoken with the police officer after having received his Miranda warnings.

At page 12 in his Petition for Certiorari, Petitioner suggests that Jacks v. Duckworth, supra, and Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), cert. denied 383 U.S. 951 (1966), stand as authority for the use of illegally obtained evidence for the purpose of rebutting an insanity defense. However, a close reading of Jacks reveals that Jacks testified and therefore the illegally obtained tape recording was properly utilized for impeachment purposes, in the face of supposed perjury. See: Harris v. New York, supra. That portion of the opinion in Jacks had nothing to do with the use of a defendant's post-Miranda silence. Similarly, Kaufman v. United States did not deal with the use of a defendant's post-Miranda silence but merely discussed and approved of the use of demeanor evidence as testified to by an agent who interviewed Kaufman after his lawyer had been appointed, in violation of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Testimony was actually restricted to the facts that the agent had conferred with Kaufman and as to Kaufman's demeanor. Noting that the testimony served only as qualifying material for the agent's opinion evidence as to Kaufman's sanity, the Court observed that "this is far different from a defendant's own incriminating statement such as were introduced into evidence in Massiah ...". 350 F.2d at 416. Again, Kaufman had nothing to do with the use of one's post-Miranda silence.

At page 15 of his Petition, Petitioner argues that "there is no rational basis upon which to deny the trier of fact probative reliable evidence on the issue of guilt, or, at bar, on the continuing viability of Greenfield's affirmative defense." Petitioner goes on to cite authority for the proposition that the insanity defense presupposes that the accused has committed the offense. Petitioner overlooks two important aspects relevant to this Court's determination. First, Greenfield's counsel did not concede or admit that Greenfield had in fact committed the offense. Secondly, Petitioner presumes probative value of silence on the issue of insanity. While at first glance this may be an appealing suggestion, one has only to review the decision of the court below and the decision of the Florida Supreme Court in State of Florida v. Burwick, before concluding that silence is susceptible to various ambiguous explanations. Furthermore, Petitioner's logic cannot overcome the explicit ruling in Doyle that silence, in the wake of the implicit assurances of the Miranda warnings, cannot be used for impeachment purposes.

Petitioner did not Preserve for Review the Issue of Bypass under Wainwright v. Sykes:

This Court should not grant certiorari as to the second issue framed by Petitioner, questioning whether the decision of the Court below conflicts with Wainwright v. Sykes. Petitioner did not assign as error in the court below the issue he now asks this Court to review. Neither was the applicability of Wainwright v. Sykes considered by the Court below, other than parenthetically in a footnote to the decision.

The issue of waiver was fully litigated in the District Court. Evidentiary proceedings were held on the issue, Respondent presented a "cause" and "prejudice" defense to the allegation of waiver and the issue was resolved by the District Court against Petitioner. The Petitioner did not, as he had a right and obligation to do, file written objections to the proposed findings

and recommendations of the Magistrate, as required by 28 U.S.C. §636(b)(1), Local Rule 6.102, Rules for the United States District Court, Middle District of Florida and Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982)(en banc). Apparently satisfied with the adverse decision of the District Court on the merits, Petitioner did not raise the Wainwright v. Sykes, issue by way of cross-appeal or otherwise. Only belatedly, in his Petition for Rehearing to the Eleventh Circuit Court of Appeals, did Petitioner raise the issue. Having failed to assign the issue as error in the court below, Petitioner should not now be heard to complain. See: e.g. Haufman v. State of Missouri, 274 U.S. 21, 47 S.Ct. 485 (1927); Sonzinsky v. United States, 300 U.S. 506, 57 S.Ct. 554 (1937).

Review is not barred by Wainwright v. Sykes:

Because the Eleventh Circuit arguably treated parenthetically the Wainwright v. Sykes issue by virtue of its comments in footnote 1 of its opinion, Respondent, would, in the alternative, suggest that this Court deny the Petition for Certiorari with respect to issue no. 2 framed in the Petition for Certiorari, on the grounds that, (1) Respondent's counsel made appropriate objections and brought the issue to the attention of the state trial court in accordance with then-existing state procedural rules, (2) both the state trial court and state appellate court addressed the merits of the issue and (3) the record will reflect that there was adequate cause for any failure to object and Respondent suffered prejudice as a result of that cause.

Petitioner's contention that Greenfield has failed to make a contemporaneous objection is tenuous at best. Notwithstanding counsel's failure to object during the state's case in chief, he strenuously objected during the prosecutor's summation (TR-339). Since the prosecutor's remarks during summation were in themselves

violative of Doyle v. Ohio and were directed to the same testimony which came in without objection, it cannot be said that there has been a waiver under the rationale of Wainwright v. Sykes, since the related objection sufficiently raised the constitutional issue. See: e.g. Thomas v. Estelle, 582 F.2d 939 (5th Cir. 1978); Collins v. Auger, 577 F.2d 1107 (8th Cir. 1978), cert. denied 439 U.S. 1133 (1979).

Sykes deals "only with contentions of Federal law which were not resolved on the merits in a state proceeding due to one's failure to raise them as required by state procedure" 433 U.S. at 72, 97 S.Ct at 2507. Sykes creates no bar to independent determination in the Federal tribunal where the merits were reviewed by the state court. Id. Here, the state appellate court reached the merits of the constitutional issue in a two page opinion. It follows that there is no basis for determining that Greenfield has waived his right to Federal review under the Sykes decision. See: Lebowitz v. Wainwright, 670 F.2d 974 (11th Cir. 1982).

To the extent that Petitioner suggests that review is barred because Greenfield's trial counsel neglected to move for a mistrial in conjunction with his objection to the prosecutor's summation, Florida's requirements of a Motion for Mistrial is a matter of decisional case law and not a specific procedural rule. A Wainwright v. Sykes waiver must be from a specific state procedural rule. Freeman v. State, 599 F.2d. 65, 71 (5th Cir. 1979), cert. denied 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980). Petitioner cites Clark v. State, 363 So.2d 331 (Fla. 1978) as authority for the procedural default. However, Clark was decided after Petitioner's trial. Furthermore, Clark decided only "... whether a contemporaneous objection is necessary to preserve as a point on appeal ..." 363 So.2d at 332. Regardless, Greenfield should not be held to the requirement of a decision which was rendered after his trial.

Finally, Petitioner overlooks a most significant aspect of this case. Greenfield has consistently complained of the prosecutor's use and comment upon his post-Miranda silence. Under Doyle, error is committed not only by the use of the post-Miranda silence but also by the prosecutor's comment thereon.

CONCLUSION

Based upon the foregoing, this Court should deny the Petition for Writ of Certiorari. The decision of the Court below follows a controlling decision of this Court and this Court has only recently denied review in a case involving substantially identical circumstances and issues.

RESPECTFULLY SUBMITTED,

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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served on Ann Garrison Paschall, Assistant Attorney General, 1313 Tampa, Street, Suite 804, Park Trammell Building, Tampa, Florida 33602 by depositing said copy in the United States Mail, First Class Postage Pre-Paid, addressed to said counsel of record at her post office address, on this 17th day of April, 1985.

JAMES D. WHITTEMORE, ESQUIRE

SWORN TO AND SUBSCRIBED before me this 17th day of April, 1985.

Notary Public
My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires March 27, 1988.